Supreme Court, U.S.
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No. 01-493

In The

Supreme Court of the United States

FRANKLIN SEXTON,

Petitioner,

v.

CHINO VALLEY INDEPENDENT FIRE DISTRICT; RAY O. SHACKLEFORD, as an individual and in his official capacity as District Fire Chief; AL GRAMS, as an individual and in his official capacity as District Fire Chief; SOUTHERN CALIFORNIA RISK MANAGEMENT ASSOCIATES, INC., a California Corporation and public entity insurance carrier,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the "public concern" threshold of the *Pickering-Connick* balancing test for determining when a public employer may regulate public-employee speech should be applied where the "speech" at issue (a federal civil rights lawsuit) addresses matters of purely private concern to the public employee.

II. Whether the Court should adopt, in modified form, the minority view of the Third Circuit which holds that the "public concern" threshold of the *Pickering-Connick* balancing test need not be applied to specified petition activity (i.e., federal civil rights litigation).

III. Whether malicious prosecution or abuse of process claims may be maintained as substantive due process violations under 42 U.S.C. § 1983.

IV. Whether malicious prosecution and abuse of process claims from underlying civil actions should be actionable as substantive due process violations under 42 U.S.C. § 1983 based on common law tort elements with proof of intentional conduct.

PARTIES TO THE PROCEEDING

Petitioner-Plaintiff: Franklin Sexton

Respondents-Defendants: Chino Valley Independent Fire District; Ray O. Shackelford, as an individual and in his official capacity as District Fire Chief; Al Grams, as an individual and in his official capacity as District Fire Chief; and Southern California Risk Management Associates, Inc., a California Corporation and public entity insurance carrier.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of the stock in Southern California Risk Management Associates, Inc.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Southern California Risk Management Associates, Inc. hereby opposes Petitioner Franklin Sexton's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Respondent hereby adopts and incorporates by reference all opinions and orders below that are set forth in Petitioner's Brief in Appendices A through J at pages 1a through 43a.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered judgment in this case on March 27, 2001. The Court of Appeals then denied Petitioner's Petition for Rehearing and for Rehearing En Banc on June 22, 2001. Petitioner's Petition for Writ of Certiorari was timely filed in accordance with Rules 13.1 and 13.3 of the Rules of the Supreme Court of the United States. Petitioner invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I.

42 U.S.C. § 1983.

California Labor Code § 3212.

California Labor Code § 5402.

California Code of Regulations, Title 8, § 14001.

All Constitutional and statutory provisions are cited verbatim at Appendix A.

STATEMENT OF THE CASE

Respondent Southern California Risk Management Associates, Inc. (hereafter "SCRMA") hereby adopts and incorporates by reference the factual background contained in the Opposition to Petition for Writ of Certiorari submitted by Respondent Chino Valley Fire District (hereafter, the "District").

1. The Role of SCRMA In This Lawsuit.

As conceded in the original Complaint filed by Petitioner in this case, SCRMA is a private corporation that provides insurance to public entities. More specifically, SCRMA is a workers' compensation carrier and claims administrator that administers workers' compensation insurance claims for both public and private employers. SCRMA is the agency that was responsible for processing Petitioner's workers' compensation claims.

It is equally important to note what SCRMA is *not* – SCRMA is not and never has been Petitioner's employer. During the entire relevant time period of this case, Petitioner was employed by the District. As Petitioner's employer, it was the District's responsibility to limit or expand Petitioner's job duties. If Petitioner was promoted or demoted, if his duties or overtime hours were somehow limited, it was the District's sole responsibility to make such decisions. SCRMA's involvement in this case is limited to its handling of Petitioner's workers' compensation claims. Indeed, no evidence was ever adduced in this action suggesting that SCRMA was responsible for *any* personnel-related actions. While the Petition for Writ of Certiorari dedicates a great deal of time detailing Petitioner's heart ailments and the District's decision to place him on limited duty, it makes no mention of any responsibility of SCRMA for deciding the nature or scope of Petitioner's duties with the District.

2. Brief Summary of Relevant Facts.

Petitioner dedicates a substantial portion of his brief to a detailed recitation of his version of facts and circumstances. This level of detail is unnecessary to dispose of the issues presented in the Petition. At its core, this case boils down to the following:

In 1990, Petitioner sued, among others, his previous employer, San Bernardino County ("*Sexton I*"). During the course of *Sexton I*, Petitioner amended his Complaint to allege, among other things, that the County's handling of his employment status gave him a heart condition that threatened to destroy his career in fire protection. *Sexton I*

was eventually resolved via settlement in September 1996.

In 1995, Petitioner filed the instant lawsuit ("*Sexton II*"). In *Sexton II*, Petitioner claimed he *never* had a disabling heart condition and that therefore, the District (the public-entity successor of San Bernardino County) never had any valid reason to place him on disability leave. According to Petitioner, he was placed on disability leave as some sort of "retaliation" for having filed *Sexton I*.

Between 1991 and 1995, however, Petitioner's annual physical examinations revealed pulmonary ventricular contractions (irregular heartbeats or "PVC's") on numerous occasions. Petitioner's brief fails to mention that pursuant to California *Labor Code*[1] § 3212, a heart condition manifesting itself in a firefighter is *presumed* to be work-related unless and until evidence is presented to contradict this presumption. Moreover, *Labor Code* § 5402 and California *Code of Regulations*, Title 8, § 14001(d) *require* that an employer file a workers' compensation notice of claim form with its workers' compensation insurance carrier when it learns of a potentially work-related injury. Upon learning of Petitioner's heart condition (a condition *presumed* to be work-related in firefighters), the District filed the appropriate notice of claim with SCRMA. Thus, the District's actions were motivated by *law* and not, as Petitioner suggests, by spite or malice.

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[1] Hereafter, all references to the Labor Code will refer to the California Labor Code, as if set forth fully.

As a result of the District's submission of a notice of claim to SCRMA, for a period of nearly two years (June 4, 1994 – April 4, 1996) Petitioner received disability benefits through the State workers' compensation system. These benefits totaled $51,667.72 – the maximum allowed by law. At no time during that period did Petitioner seek a medical opinion from a workers' compensation approved physician to prove his heart condition was benign, nor did he file papers with the Workers' Compensation Appeals Board ("WCAB") seeking to return to work and have benefits stopped.

Despite his prolonged and enthusiastic acceptance of disability benefits, Petitioner sued Respondents in 1995 claiming, among other things, that Respondents' actions resulting in Petitioner's disability status were actions taken solely in retaliation for Petitioner's resort to the federal courts in *Sexton I*. Petitioner also claimed in *Sexton II* that Respondents' initiation of workers' compensation proceedings amounted to malicious prosecution and abuse of process.

The District Court disposed of all of Petitioner's causes of action by way of multiple orders of summary adjudication. The Ninth Circuit affirmed those decisions and denied Petitioner's petition for rehearing en banc. Petitioner now attempts his last bite at the Constitutional apple with a final Petition to the Supreme Court of the United States wherein he asks the Court to throw out established Constitutional jurisprudence in favor of unsupported standards that comport with Petitioner's view of what the law "should" be.

REASONS THE PETITION SHOULD BE DENIED

I. SCRMA DID NOT TAKE ANY ACTION UNDER COLOR OF STATE LAW AND THEREFORE CANNOT BE LIABLE UNDER 42 U.S.C. § 1983.

It is a basic principle of constitutional law that individuals and private entities are not traditionally liable for violations of constitutional rights secured by the United States Constitution. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). In order to establish a violation of § 1983, Petitioner must prove that Defendants (1) deprived him of a right secured by the Constitution, and (2) acted under color of state law. 42 U.S.C. § 1983, *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). Since SCRMA is a private actor, Petitioner must prove that SCRMA's actions are attributable to the state in some manner or § 1983 liability cannot attach. *Lugar*, 457 U.S. at 937. This is a burden Petitioner did not meet in this action.

In the recent case of *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999), this Court reaffirmed the well established legal maxim that a plaintiff's § 1983 claim must be dismissed if the plaintiff does not establish that a private entity defendant acted under the color of state law:

> To state a claim for relief in an action brought under § 1983, respondents must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed *under the color of state law*. Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct,

no matter how discriminatory or wrongful.' " (emphasis added).

The color of state law requirement is important because it preserves "the essential dichotomy" between private and state action. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974); *see also, Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982). Thus, private actors cannot be liable under § 1983 unless their "conduct is fairly attributable to the State." *Sullivan*, 526 U.S. at 50.

Actions of a private entity may be attributed to the state in two instances. First, a private actor's conduct is attributed to the state if it exercises "powers traditionally exclusively reserved to the State." *Jackson*, 419 U.S. at 352; *see also, Sullivan*, 526 U.S. at 55. Second, actions of a private entity may be attributed to the state if "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351; *Sullivan*, 526 U.S. at 52. "Whether such a 'close nexus' exists depends on whether the State 'has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State.' " *Sullivan*, 526 U.S. at 52 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004, (1982)); *see also, Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978). As detailed below, SCRMA did *not* act under the color of state law because its actions are *not* attributable to the state.

Petitioner's § 1983 claim against SCRMA suffered a glaring error from the outset – it did not establish that SCRMA acted under the color of state law. Not once in

the course of this lawsuit did Petitioner even *allege* that SCRMA acted under the color of state law. Because Petitioner has never alleged, and certainly cannot establish, that SCRMA acted under the color of state law, he has "failed to establish an essential element of [his] § 1983 claim." *Sullivan*, 526 U.S. at 58.

However, even if Petitioner had argued that SCRMA acted under the color of state law the argument is without merit. A private workers' compensation insurance carrier may act under the color of state law in two ways: (1) if "the State has delegated to insurers 'powers traditionally exclusively reserved to the State,' " or (2) if " 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the latter may be fairly treated as that of the State itself.' " *Sullivan*, 526 U.S. at 52, 55 (citations omitted). SCRMA did *not* act under the color of state law because both conditions are absent.

Petitioner has simply never attempted to connect SCRMA to his 42 U.S.C. § 1983 claims. Nonetheless, Petitioner used his § 1983 claims as a way to bring SCRMA into the federal court system. As a result, Petitioner's writ should be denied – at the very least – with respect to Respondent SCRMA. SCRMA was not a proper party to this action below, and certainly should not be forced to respond further to the instant Petition. Nonetheless, SCRMA addresses the remaining substantive issues raised in the Petitioner's brief.

II. PETITIONER WOULD HAVE THIS COURT THROW OUT ESTABLISHED CONSTITUTIONAL JURISPRUDENCE SETTING FORTH THE ANALYTICAL FRAMEWORK FOR DETERMINING WHEN A PUBLIC EMPLOYER MAY REGULATE A PUBLIC EMPLOYEE'S SPEECH IN FAVOR OF HIS OWN UNGUIDED VIEW OF WHAT THE LAW "SHOULD" BE AND/OR A SLIM MINORITY OPINION.

Petitioner's myriad of Constitutional arguments boil down to one central premise: that any time a public employee sues his public-agency employer alleging that the employer retaliated against him for a prior lawsuit against the agency, courts should not employ the long-standing analytical framework set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Connick v. Myers*, 461 U.S. 137 (1983) and their progeny (hereafter referred to as the *"Pickering/Connick"* test). Instead, Petitioner would have the courts apply a new set of rules, stemming from (1) Petitioner's own unguided view of what the law "should" be; and, (2) the opinion of the Third Circuit, which – without company – affords the Petition Clause of the First Amendment heightened protection in the public employment setting.

A. PETITIONER OFFERS NO RATIONAL BASIS FOR REVERSING THE ORDER OF THE *PICKERING/CONNICK* ANALYSIS IN CASES IMPLICATING THE PETITION CLAUSE OF THE FIRST AMENDMENT.

Petitioner first argues that any time a public employee sues his public-agency employer alleging that

the employer retaliated against him for a prior lawsuit against the agency, courts should not apply the usual *Pickering/Connick* test for determining when the government may regulate employee speech. Petition for Writ of Certiorari, pp. 10-17. Instead, Petitioner suggests that the courts apply the last phase of that test first, blend it with an analytical framework derived from equal protection jurisprudence, and then return to *Pickering/Connick's* threshold question of whether or not the First Amendment activity at hand involves a matter of "public concern." *Id.* Petitioner's suggestion is unsupportable.

The existing *Pickering/Connick* analytical framework recognizes both the public employee's interest in free speech as well as the State's interest in maintaining an efficient workplace. *See, Connick, supra,* 461 U.S. at 140; *Pickering, supra,* 391 U.S. at 568. "The threshold question in applying this balancing test is whether [the employee's] speech may be 'fairly characterized as constituting speech on a matter of public concern.' " *Rankin v. McPherson,* 483 U.S. 378, 384 (1987). If, and only if, that question is answered in the affirmative, the *Pickering/Connick* analysis goes further – requiring that courts "balance [the public employee's] interest in making [his] statement against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Id.* at 388, quoting *Connick, supra,* 461 U.S. at 150. [*See also Connick, supra,* 461 U.S. at 146: "When employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their

offices, without intrusive oversight by the judiciary in the name of the First Amendment."]

In *Connick*, this Court discussed the importance of the "public concern" aspect of this analytical framework:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.

Id. at 143.

Moreover, "the Court has frequently reaffirmed that speech on public issues occupies the ' "highest rung of the hierarchy of First Amendment values," ' and is entitled to special protection." *Id.* at 145. In sum, the "public concern" threshold of the *Pickering/Connick* analysis is afforded great weight for good reason – discourse and debate on issues of consequence *to the community* are at the core of First Amendment values.

In the case at hand, Petitioner concedes that *Sexton I* did not implicate matters of public concern. He did not sue the District to improve working conditions for all firefighters, nor did he challenge the disability leave standards employed by the District on behalf of all firefighters. Rather, Petitioner sued the District in order to challenge a demotion that affected him, and him alone.

For this reason, Petitioner asks this Court to set aside the long-established significance of the "public concern"

threshold and ask first whether his "speech activity" caused any disruption to the workplace. To support this modified analysis, Petitioner attempts to import analyses from other areas of Constitutional jurisprudence in order to fashion a rule that would fit his particular needs. Unfortunately, Petitioner offers not a single rationale for disrupting the *Pickering/Connick* test in this manner. Petitioner also fails to address how his revised standard would avoid what the *Pickering/Connick* cases have strived to avoid from the beginning – "intrusive oversight [into personnel decisions] by the judiciary in the name of the First Amendment." *Connick, supra,* 461 U.S. at 146.

Moreover, Petitioner's proposed analysis assumes too much – to wit, that litigation brought by an employee against his public entity employer, so long as it is not discussed in the workplace, does not cause disruption to the workplace. Any employer that has ever been embroiled in litigation – regardless of whether the suit was brought by an employee – can attest to the fact that litigation *causes* disruption to the workplace. Litigation necessarily involves management personnel in endless rounds of discovery, depositions, attendance at hearings and strategic meetings. It shifts the focus of the workplace away from public service and toward the avoidance of liability. It also undeniably imposes a great financial burden on the employer.

This is precisely why the existing *Pickering/Connick* analytical framework should apply with equal force in cases implicating the Petition Clause of the First Amendment. If a public employee is retaliated against for suing his employer over matters that have great public import, then courts are justified in balancing the significance of

that suit to the community at large against the burden on the public employer of being embroiled in litigation. In cases like this, however, where the underlying lawsuit addresses issues of purely personal concern, courts should continue to refuse to interfere with public-entity employment decisions. Indeed, the existing *Pickering/Connick* analysis transfers very easily to cases arising under the Petition Clause of the First Amendment. As such, Petitioner's "modified" analysis should be rejected in its entirety, and the Petition for Writ of Certiorari should be denied.

B. THE THIRD CIRCUIT'S DECISION IN *SAN FILIPPO* DOES NOT CREATE A SIGNIFICANT SPLIT AMONG THE CIRCUITS ON THE ISSUE OF WHETHER THE "PUBLIC CONCERN" THRESHOLD OF *PICKERING/CONNICK* SHOULD BE APPLIED IN CASES ARISING UNDER THE PETITION CLAUSE OF THE FIRST AMENDMENT.

Petitioner next argues that this Court should grant his Petition for Writ of Certiorari to resolve a split among the Circuits with respect to whether the "public concern" threshold of the *Pickering/Connick* analysis should apply in cases arising under the Petition Clause of the First Amendment. Petition for Writ of Certiorari, pp. 17-21. Petitioner quickly – and correctly – points out, however, that the Third Circuit Court of Appeals is the only Circuit to hold that that use of the "public concern" threshold is inappropriate in this setting. [*See White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (2d Cir. 1993); *Day v. South Park Independent School District*, 768 F.2d 696 (5th

Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986); *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989); *Rice v. Ohio Dep't of Transportation*, 887 F.2d 716 (6th Cir. 1989), *vacated on other grounds*, 497 U.S. 1001 (1990); *Valot v. Southeast Local School District Board of Education*, 107 F.3d 1220 (6th Cir. 1997); *Altman v. Hurst*, 734 F.2d 1240 (7th Cir. 1984); *Belk v. Town of Minocqua*, 858 F.2d 1258 (7th Cir. 1988); *Gearhart v. Thorne*, 768 F.2d 1072 (9th Cir. 1985); *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997); *Grabow v. Independent School District No. I-008*, 86 F.3d 1166 (10th Cir. 1996) (unpublished; citation permissible under 10th Cir. rules); *Renfroe v. Kirkpatrick*, 722 F.2d 714 (11th Cir. 1984), *cert. denied*, 469 U.S. 823 (1984).]

Indeed, "[t]he Third Circuit alone has diverged from other circuits and has held that a public employee is protected under the Petition Clause against retaliation for having filed a lawsuit even if that lawsuit addresses matters of purely private concern." *Rendish v. City of Tacoma*, 123 F.3d 1216, 1222 (9th Cir. 1997), citing *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). Nonetheless, Petitioner clings to the Third Circuit's decision in *San Filippo*, arguing that it creates the sort of impenetrable split among Federal Courts of Appeal that justifies the granting of a Petition for Writ of Certiorari. Petitioner is wrong.

The reasoning employed in *San Filippo* is unsupportable and has been subject to great criticism from the other Circuits. Central to its holding is the premise that:

> [W]hen a government . . . formally adopts a mechanism for redress of grievances for which government is allegedly accountable, it would

> seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious 'petition' invoking that mechanism may be disciplined for such invocation by the very government that in compliance with the petition clause has given the particular mechanism with its constitutional imprimatur.

San Filippo, supra, 30 F.3d at 442.

The Ninth Circuit, among others, strongly disagrees with this analysis:

> First, [the Third Circuit's analysis] diverges from the Supreme Court's teachings that the primary function of the First Amendment is to facilitate participation in a free political process and that the First Amendment extends its guarantees to public employees in order to encourage such participation. Moreover, it equates the government's conduct as employer with its conduct as government. When government as employer disciplines an employee for pursuing litigation, it does not act as "the very government" which established the mechanism for redress in accordance with its constitutional obligation, but rather as its role as an employer.

Rendish v. City of Tacoma, supra, 123 F.3d at 1223.

The Ninth Circuit, and other Circuits that have rejected the *San Filippo* analysis, are in accord with a long line of established First Amendment jurisprudence. [*See* citation to other Circuits that have rejected the *San Filippo* analysis, *supra.*] Undeniably, speech activity – whether it comes in the form of litigation or more "traditional" forms of speech – must be protected from unreasonable intrusion. Nonetheless, the government *must* have the

ability to manage the public workplace and must be able to make personnel decisions in that workplace. The *Pickering/Connick* analytical framework zealously guards and balances these crucial interests. It does so, as noted above, by asking at the outset, whether the employee's speech implicates matters of concern to the community. The analysis is equally efficient when applied to petition activity, as it is when it is applied to "traditional" speech activity. As such, this Court should ignore the slim majority position proffered by the Third Circuit and deny Petitioner's Petition for Writ of Certiorari on this issue.

C. UNDER ANY TEST, PETITIONER'S CLAIMS WOULD FAIL BECAUSE THE ALLEGED "RETALIATION" BY THE DISTRICT WAS, IN REALITY, AN ACTION IT WAS MANDATED TO TAKE BY LAW.

It is significant to note that even if this Court granted Certiorari and later adopted the various Constitutional analyses put forth by Petitioner, his claims against the District would still fail. Indeed, under the existing analytical framework *or* that proposed by Petitioner, courts must address the question of whether the government would have taken the same action against the claimant in the absence of the allegedly "protected" speech activity. [*See* Petition for Writ of Certiorari, p. 13, suggesting that the Court adopt portions of an analysis used in the equal protection context in which "the employer . . . must articulate a legitimate nondiscriminatory employment reason for its actions"; *see also Board of County Commissioners v. Umbehr*, 518 U.S. 668, 675 (1996) "To prevail [in an action alleging retaliation for exercising his First

Amendment rights], an employee must prove (1) that the conduct at issue is constitutionally protected, and (2) that it was a substantial or motivating factor in the [retaliation]. If the employee discharges that burden, (3) the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct." (Enumeration added.)]

In this case, Petitioner claims that the District retaliated against him for filing *Sexton I* by initiating workers' compensation proceedings against him. Petitioner fails to acknowledge that the District was legally obligated to institute those workers' compensation procedures. As noted above, Petitioner's heart condition was *presumed* to be work-related pursuant to *Labor Code* § 3212. Once the District learned of that heart condition, it had no choice but to file a workers' compensation claim. *See Labor Code* § 5402; California *Code Regs.*, Title 8, § 14001(d). As such, Petitioner's filing of *Sexton I* was irrelevant to the District's initiation of workers' compensation proceedings. The District was legally obligated to institute those proceedings under any circumstances. Consequently, Petitioner's claims would fail under any of the tests put before the Court in this action. The Petition for Writ of Certiorari should be denied accordingly.

III. MALICIOUS PROSECUTION AND ABUSE OF PROCESS CLAIMS SHOULD NOT BE RECOGNIZED IN 42 U.S.C. § 1983 CLAIMS IN THE ABSENCE OF A TRUE UNDERLYING CONSTITUTIONAL DEPRIVATION.

As he did repeatedly below, Petitioner again tries to hang his hat on *Albright v. Oliver*, 510 U.S. 266 (1994),

arguing that that case stands for the proposition that a vague substantive due process claim should serve as a Constitutional "hook" for his claims of malicious prosecution and abuse of process against Respondents. In so doing, Petitioner urges that "it is instructive to compare the relevant formulations of the substantive due process standard with the governing elements of a malicious prosecution claim as reflected in the common law of torts." Petition for Writ of Certiorari, p. 27. Specifically, Petitioner points out that substantive due process claims require proof of actions that are arbitrary or shock the conscience of the court (*citing County of Sacramento v. Lewis*, 523 U.S. 833, 846-50 (1998)) and that, similarly, common law claims for malicious prosecution cannot succeed without a showing of probable cause and malice. Petition for Writ of Certiorari, p. 28. Based on these "comparable standards," Petitioner concludes that the alleged malicious prosecution may alone constitute sufficient Constitutional deprivation to justify a § 1983 claim alleging malicious prosecution or abuse of process. This circular reasoning is unpersuasive.

First, *Albright* is inapplicable to Petitioner's claims. That case involved an allegedly malicious prosecution arising from an underlying criminal prosecution. Moreover, the Fourth Amendment analysis employed in *Albright* was factually driven. Specifically, this Court decided that an arrest warrant constituted a seizure – making the Fourth Amendment analysis appropriate. *Albright, supra*, 510 U.S. at 811. Here, there is no analogous Constitutional "hook."

It should also be noted that Petitioner's substantive due process claims were summarily adjudicated in *Sexton*

II – a decision that is not challenged here. [*See* Petition for Writ of Certiorari, App. E, p. 36a.] Moreover, Petitioner – once again – would not be able to prevail in this case under his own proposed standard. Even if this Court overturned the Ninth Circuit holding that a malicious prosecution claim is not cognizable under 42 U.S.C. § 1983 except where "a malicious prosecution is conducted with the intent to deprive a person of equal protection laws or is otherwise intended to subject a person to a denial of constitutional rights," (*Usher v. City of Los Angeles*, 828 F.2d 556, 561-62 (9th Cir. 1987), *citing Brentz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (*en banc*) and *Cline v. Brusett*, 661 F.2d 108, 112 (9th Cir. 1981)), Petitioner could not prevail under common law malicious prosecution principles. Petitioner simply cannot show that the workers' compensation proceedings were initiated against him "without probable cause." *See Nicholson v. Lucas*, 21 Cal.App.4th 1657, 1664 (1994).

Indeed, as noted repeatedly above, the District was legally obligated to initiate workers' compensation proceedings against Petitioner. Furthermore, the specific "proceedings" initiated by the District did not include the filing of any accusations against Petitioner. Given the medical information available to it, the District had no choice but to file a *notice of claim* and let the doctors determine the status of Petitioner's heart condition. Unlike typical civil actions, this proceeding allowed Petitioner the opportunity to file his own documents with his own doctor's reports demonstrating the *lack* of a heart condition. Petitioner, however, chose to collect benefits and let the District's actions linger unchallenged for nearly two years. Nor did the District seek monetary

recovery from Petitioner – another hallmark of typical civil litigation. Indeed, to the contrary, the District initiated the workers' compensation proceedings and then proceeded to pay Petitioner over $51,000 in benefits. Petitioner's acceptance of those benefits amounts to at least tacit approval of the allegedly "malicious" initiation of the proceedings against him.

In sum, Petitioner's arguments fail to make sense legally or factually. As such, his claims and assertions are not appropriate for review by this Court. The Court should deny the Petition for Writ of Certiorari and let the District – and Petitioner – get back to their vital public function of fighting fires and handling public emergencies.

IV. CONCLUSION.

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

California Labor Code § 3212:

> "Injury"; Certain persons engaged in law enforcement and firefighting; Compensation for hernia, heart trouble or pneumonia; Presumption.
>
> In the case of members of a sheriff's office, district attorney's staff of inspectors and investigators or of police or fire departments of cities,

counties, cities and counties, districts or other public or municipal corporations or political subdivisions, whether such members are volunteer, partly paid, or fully paid, and in the case of active firefighting members of the Department of Forestry and Fire Protection whose duties require firefighting or of any county forestry or firefighting department or unit, whether voluntary, fully paid, or partly paid, and in the case of members of the warden service of the Wildlife Protection Branch of the Department of Fish and Game whose principal duties consist of active law enforcement service, excepting those whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement service such as stenographer, telephone operators, and other officeworkers, the term "injury" as used in this act includes hernia when any part of the hernia develops or manifests itself during a period while such member is in the service in such office, staff, division, department or unit, and in the case of members of such fire departments, except those whose principal duties are clerical, such as stenographers, telephone operators and other officeworkers, and in the case of county forestry or firefighting departments, except those whose principal duties are clerical, such as stenographers, telephone operators and other officeworkers, and in the case of active firefighting members of the Department of Forestry and Fire Protection whose duties require firefighting, and in the case of members of the warden service of the Wildlife Protection Branch of the Department of Fish and Game whose principal duties consist of active law enforcement service,

excepting those whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement service such as stenographer, telephone operators, and other officeworkers, the term "injury" includes pneumonia and heart trouble which develops or manifests itself during a period while such member is in the service of such office, staff, department or unit. In the case of regular salaried county or city and county peace officers, the term "injury" also includes any hernia which manifests itself or develops during a period while the officer is in the service. The compensation which is awarded for such hernia, heart trouble or pneumonia shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by the workers' compensation laws of this state.

Such hernia, heart trouble or pneumonia so developing or manifesting itself in such cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. Such presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

Such hernia, heart trouble or pneumonia so developing or manifesting itself in such cases shall in no case be attributed to any disease

existing prior to such development or manifestation.

California Labor Code § 5402

Notice of injury; Knowledge of injury equivalent to service.

(a) Knowledge of an injury, obtained from any source, on the part of an employer, his or her managing agent, superintendent, foreman, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service under Section 5400.

(b) If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period.

California Code of Regulations, Title 8, section 14001:

(a) Every employer shall file a complete report of every occupational injury or occupational illness to each employee which results in lost time beyond the date of such injury or illness or which requires medical treatment beyond first aid, as defined in Labor Code Section 5401(a). As used in this subdivision, "lost time" means absence from work for a full day or shift beyond the date of the injury or illness.

(b) In the event an employer has filed a report of injury or illness pursuant to subdivision 14001(a), and the employee subsequently dies as a result of the reported injury or illness, the

employer shall file an amended report indicating such death, within five days after the employer is notified or learns of the death.

(c) The reports required by subdivisions (a) and (b) shall be made on form 5020, Rev. 6, Employer's Report of Occupational Injury or Illness, reproduced in accordance with Section 14005, or by use of computer input media, prescribed by the Division and compatible with the Division's computer equipment. However, reports may be submitted on Form 5020, Rev. 5 until June 30, 1993.

(d) In the case of a self-insured employer, the reports required by subdivision 14001(a) and (b) shall be filed directly with the Division within five days after the employer obtains knowledge of the injury, illness or death. In addition, the self-insured employer shall transmit the doctor's report filed in accordance with Section 14003 to the Division within five days of receipt.

(e) In the case of an insured employer, the report required by subdivisions 14001(a) and (b) shall be filed with the insurer within five days after such insured employer obtains knowledge of the injury, illness or death.

(f) To assure timely filing of the doctor's first report, the employer, upon request by the physician, shall immediately disclose the name and address of the employer's workers' compensation insurance provider.